No. 11040

United States Circuit Court of Appeals

For the Ninth Circuit

THE PULLMAN COMPANY, a Corporation,
Appellant,

v.

MAGGIE MAE TEUTSCHMAN,
Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

PETITION FOR REHEARING

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THE PULLMAN COMPANY, appellant herein, respectfully petitions this court for a rehearing in this case, and in support of its petition represents and shows to the court as follows:

The opinion of this court is predicated upon the assumption that the District Court found appellee had inadvertently fallen from her berth. The District Court, however, did not so find. The issue at the trial was whether the fall occurred inadvertently, as ap-

pellee claimed, or while she was crawling from the berth, as appellant claimed. It was the trial court's view that it was unnecessary to decide which was the correct version and therefore it did not pass upon the question or make a finding in regard thereto. Its finding was that had appellant seen to it that the curtains were fastened, this would have kept appellee from "either falling out or getting out of said upper berth." (Record 33)

Since the trial court did not pass on this question, it must be assumed that appellee fell while attempting to get out of her berth. The validity of the trial court's findings, therefore, should be tested on this appeal by inquiring whether there was any substantial evidence that appellant had knowledge of a condition rendering it likely that appellee would attempt to *get out* of her berth and, if so, whether fastening the perpendicular buttons was an appropriate measure to prevent her from so doing.

It may be assumed the evidence was sufficient to establish a duty to take appropriate precautions against

an inadvertent fall; but the evidence and findings concerning the position of the curtains and the manner in which they were affixed to the berth establishes to a moral certainty the fact that the precautions taken were adequate to prevent such a fall and that the accident could have happened only because appellee was attempting to crawl from her berth. The decision in this case is, therefore, of considerable importance to carriers because of its implication that appellant was under a duty to take measures amounting to physical restraint. Moreover, the decision appears to impose an extraordinary duty upon appellant by requiring it to fasten buttons which are designed for use by passengers and are difficult, if not impossible, to fasten from outside the berth.

It is earnestly submitted that the facts commented upon by this court as within appellant's knowledge were insufficient to put it on notice that appellee would try to get out of her berth; and that the measures which the court suggests should have been taken were not reasonably required and, in any event, would have been ineffectual to prevent appellee from getting out of her berth.

WHEREFORE, appellant respectfully prays this court for an order granting a rehearing in this case.

Respectfully submitted,

M. B. STRAYER,
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Attorneys for Appellant.

I HEREBY CERTIFY that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

M. B. STRAYER,
Of Counsel for Appellant.